Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ODIE WASHINGTON, Director, Illinois Department of Corrections, in his official capacity,

Petitioner,

v.

MICHAEL BARGER and RICHARD MAEZ, individually and on behalf of all others similarly situated,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a statutory amendment that eliminates participation in educational programs for prisoners convicted of certain crimes violate the *ex post facto* clause of the United States Constitution where a prisoner may earn additional good conduct credits toward early release by successful completion of such programs, but where participation in such programs had always been contingent upon adequate state funding, academic success, and incarceration location and status?

LIST OF PARTIES

The Petitioner, Odie Washington, is the director of the Illinois Department of Corrections and the successor to Howard Peters, III, who was the director of the Illinois Department of Corrections at the time this case was considered by the state trial court and was the defendant and appellant below.

The named Respondents are representatives of a class certified by the state trial court as:

> All persons who: 1) committed offenses on or after September 10, 1990 to and including August 10, 1993, 2) have been or will be committed to the Illinois Department of Corrections, 3) were or would have been eligible on August 10, 1993 for the 1.25 enhanced educational good conduct credit under Pub. Act 86-1373 (730 ILCS 5/3-6-3(a)(4) (1993)), and 4) were rendered ineligible for enhanced educational good conduct credit under Pub. Act 88-311 (eff. August 11, 1993).

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Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

PETITION FOR WRIT OF CERTIORARI

Odie Washington, Director of the Illinois Department of Corrections, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Illinois in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Illinois is reprinted in the appendix hereto, p. App. 1, *infra*, and is reported *sub nom. Michael Barger, et al. v. Howard Peters III, Director of Corrections*, at 163 Ill. 2d 357, 645 N.E.2d 175 (1994).

The order of the Circuit Court of Cook County, Illinois, dated January 27, 1994, granting a permanent injunction is not reported, but is reprinted in the appendix at p. App. 11. The final order of that court dated February 8, 1994, certifying the class of plaintiffs and extending the permanent injunction to that class is also not reported, but is reprinted in the appendix at pp. App. 12-14.

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on December 22, 1994, affirming the permanent injunction entered by the Circuit Court of Cook County, Illinois. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

The federal question whether a state amendment violated the *ex post facto* prohibition of the United States Constitution was raised in the respondents' complaint. C2 at ¶ 1. The Circuit Court of Cook County Illinois found the amendment did violate that provision of the Constitution. pp. App. 12-14. The Supreme Court of Illinois, directly reviewing the trial court pursuant to its own Rule 302(a), 134 Ill. 2d R. 302(a), affirmed. pp. App. 1-10.

CONSTITUTIONAL PROVISIONS AT ISSUE

No State shall. . . pass any . . . ex post facto Law . . . .

U.S. Const. art. I, § 10.

No ex post facto law . . . shall be passed.

Ill. Const. art. I, § 16.

STATUTORY PROVISIONS AT ISSUE

Section 15 of Public Act 88-311, 1993 Ill. Laws 2611-13, effective August 11, 1993.

Public Act 86-1373, 1990 Ill. Laws 2844-45, effective September 10, 1990.

The above statutes are reproduced in the appendix beginning at p. App. 16.

STATEMENT OF THE CASE

I. Elimination of the Opportunity to Participate in Educational Programs for Prisoners Convicted of Certain Crimes.

Effective September 10, 1990, Illinois amended its Unified Code of Corrections to provide for an enhancement of automatic day-for-day good conduct credits prisoners were given toward early release by a factor of 1.25 for prisoners participating in educational programs. *See* 730 ILCS 5/3-6-3 (1992). The amendment provided:

> Educational programs . . . shall be made available to any inmate seeking admission to such programs within the limits of fiscal resources appropriated by the General Assembly for such purpose. Eligible inmates who are denied immediate admission shall be placed on a waiting list under criteria established by the Department. The inability of any inmate to become engaged in any such educational program by reason of insufficient program resources or for any other reason established under the rules and regulations of the Department shall not be deemed a cause of action under which the Department or any employee or agent of the Department shall be liable for damages to the inmate.

p. App. 21.

Regulations implementing the amendment provided for the award of educational good conduct credits provided: 1) the prisoner was eligible to receive good time in accordance with other regulations; 2) the prisoner had not been convicted of a crime specifically excluded; 3) the prisoner had not been convicted of a felony committed after a previous award of educational good conduct credits; and 4) the prisoner achieved educational goals established for him by the Department of Corrections within a specified period. pp. App. 27.

The regulations provided for revision of the goal period to the date of removal from a program under certain circumstances, including placement in protective custody or transfer for non-disciplinary reasons. However, they also provided that a prisoner not receive any educational good conduct credits if he is removed from the educational program for any other reason. They further provided that the Director of the Department of Corrections could suspend educational programs "for reasons including, but not limited to, safety and security, budgetary constraints, insufficient program resources, inadequate space or unavailability of educational staff." pp. App. 28-30.

Nearly three years later, effective August 11, 1993, Illinois again amended its statutes to, among other things, increase the enhancement factor to 1.50 and exclude from eligibility for enhancement those convicted of criminal sexual assault, felony criminal sexual abuse, aggravated criminal sexual abuse, and aggravated battery with a firearm, as well as those who had previously served more than one felony sentence. p. App. 17. The legislative debates on this amendment indicate that, due to inadequate funding, there were at that time 4,000 prisoners on a waiting list to enter educational programs. p. App. 32.

The trial court found Respondents Barger and Maez were representatives of a class described as:

> All persons who: 1) committed offenses on or after September 10, 1990 to and including August 10, 1993, 2) have been or will be committed to the Illinois Department of Corrections, 3) were or would have been eligible on August 10, 1993 for the 1.25 enhanced educational good conduct credit under Pub. Act 86-1373 (730 ILCS 5/3-6-3(a)(4) (1993)), and 4) were rendered ineligible for enhanced educational good conduct credit under Pub. Act 88-311 (eff. August 11, 1993).

p. App. 13.

II. How the Federal Question Was Presented.

Respondents' complaint alleged that application of the 1993 amendment to their disadvantage violated the *ex post facto* clauses of both the Illinois and the United States Constitutions. C2 at ¶ 1. The Circuit Court of Cook County found the amendment violated both federal and state *ex post facto* clauses. p. App. 13. The Supreme Court of Illinois, directly reviewing the trial court pursuant to its own Rule 302(a), 134 Ill. 2d R. 302(a), affirmed both findings. pp. App. 1-10. It interpreted the state clause in step with the federal clause. p. App. 3.

III. The Decision of the Supreme Court of Illinois.

After first determining that the state constitution's *ex post facto* prohibition must be interpreted in a manner consistent with this Court's construction of the Federal *ex post facto* clause, the Supreme Court of Illinois found that the 1993 amendment violated the *ex post facto* prohibitions of both constitutions.

Of the categories of *ex post facto* laws set out in *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 1 L. Ed. 648 (1798), the court found relevant those "that change[ ] the punishment, and

inflict[ ] a greater punishment, than the law annexed to the crime when committed." pp. App. 4-5. Citing to *Collins v. Youngblood*, 497 U.S. 37, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990), the court noted that "[i]f the law does not so affect the punishment associated with a crime, it is of no moment that the law may work to a prisoner's disadvantage." p. App. 5. However, relying upon this Court's earlier decision in *Weaver v. Graham*, 450 U.S. 24, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981), the court reasoned that "punishment" is not to be equated with "sentence" and found that:

> any legislation curtailing the possibility of reducing actual prison time makes more onerous the consequence associated with a crime. It is entirely inconsequential that capitalizing on the opportunity may depend on an inmate's success in staying out of trouble or attaining other goals.

p. App. 5. Because it found that the 1993 amendment "curtails the opportunity for an earlier release . . . and so makes more burdensome the punishment associated with the crimes of the plaintiff class," it found that amendment was *ex post facto*. p. App. 6.

Justice Heiple filed a dissent with which Justice Nickels joined. He suggested that the majority was, in essence, applying the broad interpretation of *ex post facto* rejected in *Collins*, i.e., that there is an *ex post facto* violation whenever a law retroactively works to a prisoner's disadvantage. p. App. 7. In his view, the majority ignored that portion of the *Calder* definition that requires that the law in issue change the punishment "annexed to the crime, when committed," p. App. 8, *citing Calder*, 3 U.S. at 390, and raised questions as to the thousands of prisoners waiting to enter an educational program. p. App. 8.

Justice Heiple stated that the 1993 amendment met the purpose of the *ex post facto* prohibition to "assure that legis-

lative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." *Id., citing Weaver*, 450 U.S. at 28-29. He recognized that automatic credit for good behavior was a law annexed to the crime, but believed that the educational good conduct credits in issue were not. pp. App. 9-10. He stated: "[t]he arbitrary and uncertain availability of the educational programs precludes any suggestion that criminals anticipate that their sentences will be reduced if they choose to participate in educational programs." p. App. 10.

REASONS FOR GRANTING THE WRIT

I.

Review by this Court Is Necessary to Resolve Conflicts in Principle Between Lower Courts and to Eliminate Confusion and Uncertainty in the State Legislatures, Thereby Allowing the States to Confidently Address an Area of Great Public Importance.

Like many of its sister states, Illinois is attempting to resolve the problems of prison overcrowding and recidivism while remaining fiscally sound. After extensive study and debate, it determined that the best means of achieving its objectives was to allow prisoners to earn credits toward early release by successfully completing educational programs. *See* Transcript of the Illinois Senate Debate, 88th General Assembly, April 16, 1993, (First Proof) at pp. App. 31-40.[1] However, under the program adopted, no prisoner

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[1] The debate continues. Between January 1 and March 7, 1995, fourteen bills have been introduced in the Illinois General Assembly that would alter the early release provisions contained in section 3-6-3 of the Illinois Unified Code of Corrections. 730 ILCS 5/3-6-3 (1992). They are House Bills 298, 299, 594, 643, 706, 1052, 1175, 1636, 1722, 2038, and 2089 and Senate Bills 142, 558, and 1118.

could be assured that he would have an opportunity to participate in an educational program for a number of reasons. *See* pp. App. 21, 24-30. Lack of financial resources alone created a waiting list of over 4,000 prisoners for these programs. p. App. 32.

In the decision below, the Supreme Court of Illinois ruled that any reduction in the scope of the program would violate the *ex post facto* clause for those adversely affected who had committed their crimes while the program was in full force. It reasoned:

> any legislation curtailing the possibility of reducing actual prison time makes more onerous the consequence associated with a crime. It is entirely inconsequential that capitalizing on the opportunity may depend on an inmate's success in staying out of trouble or attaining other goals.

p. App. 5.

This reasoning poses significant logistical problems for corrections officials. To avoid *ex post facto* implications, they may need to administer every program a state has used that might potentially reduce time spent in prison and apply each on nearly an individual basis depending upon the time each prisoner committed his particular crime. The more practical solution may be for states to curtail experimentation in correctional programs. Such rigidity would be beneficial only if there was some confidence that current programs were adequately achieving their goals. That does not seem to be the case. States are using a variety of programs and frequently alter those programs as they search for efficacious means to reduce their prison populations and recidivism. *See*, e.g., *supra* at 7 n.1. *See also* James B. Jacobs, *Sentencing by Prison Personnel: Good Time*, 30 U.C.L.A. L. Rev. 217, 226-28 (1982) (charting state early release provisions then in force).

Given the generally prevailing dissatisfaction with incarceration programs, changes and experimentation should be encouraged, not discouraged. Yet, the effect of the holding in the decision below and of the confusion it generates is likely to hinder the states' ability to experiment with early release programs to find the best solution to a difficult problem.[2]

The confusion caused by the decision below is compounded by the fact that it conflicts in principle with a more recent decision of the United States Court of Appeals for the Eleventh Circuit. In *Hock v. Singletary*, 41 F.3d 1470 (11th Cir. 1995), the Eleventh Circuit found that the State of Florida's switch from a "provisional credit" early release system to a "control release" program (both providing mechanisms for early release based upon the prison population level) did not violate *ex post facto* prohibitions, even though the former had applied to murderers while the latter did not. *See Herring v. Singletary*, No. TCA 93-40298-MMP, 1995 U.S. Dist. LEXIS (N.D. Fla. Feb. 16, 1995) (a magistrate's report and recommendation that relied on *Hock* and more fully sets out the details and history of Florida's early release provisions, including that at issue in *Hock*).

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[2] Moreover, the rationale used in the decision below has implications for related issues. This Court has pending before it review of a decision of the United States Court of Appeals for the Ninth Circuit involving the question whether a retrospective decrease in the frequency of parole suitability hearings constitutes an *ex post facto* violation. *California Department of Corrections v. Morales*, No. 93-1462 (argued January 9, 1995). Believing there was a significant relationship between frequency of parole hearings and early release provisions, the Supreme Court of Illinois relied heavily upon its own opinion in this area to decide the case at bar. p. App. 4, *citing Tiller v. Klincar*, 138 Ill.2d 1, 561 N.E.2d 576 (1990), *cert. denied*, 498 U.S. 1031 (1991).

Like the Supreme Court of Illinois, the Eleventh Circuit relied on *Weaver v. Graham*, 450 U.S. 24, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981), but found that control release, being "procedural" and "for the convenience of the [Florida] Department of Corrections," did not affect *punishment* and could not give rise to an *ex post facto* violation. 41 F.3d at 1472. It reasoned: "Because control release is based on an arbitrary and unpredictable determinant, the prison population level, an inmate has no reasonable expectation at the time he is sentenced that the prison population will reach the specified triggering level and that his incarceration will therefore be reduced." 41 F.3d at 1472-73. Guided by *Weaver*, the Eleventh Circuit stated: "The Ex Post Facto Clause operates not to protect an individual's right to less punishment, but rather as a means of assuring that an individual will receive fair warning of criminal statutes and the punishments they carry." 41 F.3d at 1471-72.

The courts' two analyses can hardly be more divergent. While the Eleventh Circuit reasons the *ex post facto* clause does not operate "to protect an individual's right to less punishment," 41 F.3d at 1471-72, the Illinois court finds any curtailment of the possibility of reducing time spent in prison to be a violation of the *ex post facto* clause. p. App. 5. Moreover, both courts purport to base their analyses on this Court's decision in *Weaver*.

Review by this Court is necessary to resolve the conflict in principle between Supreme Court of Illinois and the Eleventh Circuit. Guidance is required to clarify the implications of this Court's holding in *Weaver* and to allow the States to confidently attack the problems of prison overcrowding and recidivism.

II.

The Supreme Court of Illinois Should Be Reversed Because it Misapplied this Court's Ruling In *Weaver*, Failed to Apply this Court's Ruling in *Collins*, and Misunderstood What Constitutes "Punishment . . . Annexed to the Crime" Within the Meaning of *Calder* and the *Ex Post Facto* Clause.

In reaching its holding, the majority of the Supreme Court of Illinois failed to apply this Court's holding in *Collins v. Youngblood*, 497 U.S. 37, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990), that retrospective legislation creating a mere disadvantage to prisoners is insufficient to establish an *ex post facto* violation and misunderstood this Court's centuries-old holding in *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390, 1 L. Ed. 648 (1798), that acts like that in issue violate *ex post facto* prohibitions only when they increase "punishment . . . annexed to the crime." The majority also failed to appreciate that the facts before this Court in *Weaver v. Graham*, 450 U.S. 24, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981), involved retrospective reduction of automatically credited early release time whereas the early release time in dispute must not only be earned, but is contingent on many factors beyond the control of the prisoner. The contingencies not only involve effort, but factors such as aptitude, security, sufficient staffing, and adequate funding. pp. App. 28-30.

In *Collins*, this Court unequivocally stated that its interpretation of the prohibition of the *ex post facto* clause is the same as the interpretation it provided nearly 200 years ago in *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 1 L. Ed. 648 (1798). The Court stated that the categories set out in *Calder* still define the prohibition:

> 1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that

> *aggravates* a *crime*, or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*.

Collins, 497 U.S. at 42, *quoting Calder*, 3 U.S. (3 Dall.) at 390 (emphases in *Calder*); *see Collins*, 497 U.S. at 47.

This Court in *Collins* specifically rejected its prior holding in *Kring v. Missouri*, 107 U.S. 221, 2 S. Ct. 443, 27 L. Ed. 506 (1883), which had suggested that the categories of *ex post facto* laws set out in *Calder* were not exhaustive and that it might also be an *ex post facto* violation for a law merely to, "in relation to the offence or its consequences, alter[] the situation of a party to his disadvantage." *Collins*, 497 U.S. at 48-49 (emphasis deleted), *quoting Kring*, 107 U.S. at 228-29.

While obviously not applying the later ruling in *Collins* and not explicitly using the language of *Calder*, this Court in *Weaver* in effect found that a retrospective decrease in the type of early release time that is automatically credited to a prisoner and, as long as he merely stays out of trouble, retained and used by that prisoner is an increase in "punishment . . . annexed to the crime." It did *not* hold that the same would be true of a retrospective decrease in any type of early release time. In fact, in rejecting the State of Florida's argument that the reduction in automatic "good time" was sufficiently compensated by an increase in discretionary good time, this Court recognized that the several types of good time are distinct. 450 U.S. at 35-36.

One of the types of good time labeled as "discretionary" in *Weaver* was good time based upon "diligent performance in an academic program." 450 U.S. at 35. In a footnote, this

Court stated that "[t]he discretionary extra gain time cannot fully compensate for the reduced accumulation of gain time for good behavior *for the discretionary credit is more uncertain.*" *Id.* at n.20 (emphasis added).

While *Weaver* did not hold that a diminution in the opportunity for obtaining discretionary good time was not a violation of *ex post facto*, it certainly does not support a holding that it was, particularly when viewed through the more narrow focus of *Collins*. Yet, the Supreme Court of Illinois relied on *Weaver* for just that proposition. pp. App. 3-6. Without fully appreciating the implications of *Collins*, it stated that in *Weaver* this Court used "an expansive interpretation of the *ex post facto* clause" based upon the "detriment" language. p. App. 3. Applying the "expansive interpretation" it perceived in *Weaver*, the court found retrospective loss of any possibility for earlier release violated *ex post facto* prohibitions without considering that the type of early release credits at issue before it were very different than the type of credits at issue in *Weaver*. p. App. 4, citing *Weaver*, 450 U.S. at 33-34.

In contrast to the Illinois Supreme Court's interpretation of *Weaver*, the Eleventh Circuit in *Hock* cited to *Weaver* for the proposition that "[t]he Ex Post Facto Clause operates not to protect an individual's right to less punishment, but rather as a means of assuring that an individual will receive fair warning of criminal statutes and punishment." 41 F.3d at 1471-72. This is, indeed, one of the two purposes of the *ex post facto* clause recited in *Weaver*, the other being to restrain arbitrary and vindictive legislation. 450 U.S. at 28-29.

The Illinois legislation here in issue can not be characterized as arbitrary, vindictive, or even punitive. *See* Transcript of the Illinois Senate Debate, 88th General Assembly, April 16, 1993, (First Proof) at pp. App. 31-40. Because of

the many contingencies in obtaining educational early release credits under the pre-existing Illinois program, retrospective application of the amendment narrowing the applicability of that program also does not interfere with fair warning. Because the legislation in issue does not impair either purpose of the *ex post facto* clause, the decision of the Supreme Court of Illinois should be reversed.

CONCLUSION

For these reasons, Odie Washington respectfully asks this Court to issue a writ of certiorari to review the opinion and judgment of the Supreme Court of Illinois.

Respectfully submitted,

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